Lim Liang Kee & Anor v Goh Bee Hwa Mabel & Ors (Lim Choon Min & Ors, interveners)

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–604 OF 1996
ABDUL MALIK ISHAK J
3 JANUARY 1997

Succession *— Administration — Sale of land — Application for leave to sell land — Refusal of beneficiaries to give consent — Whether contract was conditional and unenforceable until permission of the court was obtained — Whether court should protect rights of beneficiaries or give preference to rights of purchasers — Whether purchasers could obtain specific performance of contract*

By a sale and purchase agreement ('the agreement') dated 7 September 1993, the applicants as administratrixes of the estate of Goh Keng Hee ('the deceased') agreed to sell three pieces of agricultural lands ('the lands') to the interveners. The agreement was entered into between the parties on the strength of a document known as 'Authorization and Agreement' ('the authorization document') dated 14 August 1993. The authorization document gave the land broker, acting for the applicants, an irrevocable authority to sell the lands free from encumbrances and with vacant possession subject to certain terms and conditions. The authorization document also contained a clause that the beneficiaries 'shall agree to the authorization and agreement'. In accordance with the authorization document, the applicants applied for an order approving the sale of the lands to the interveners.

The respondents were beneficiaries of the estate of the deceased. They had filed affidavits and refused to give consent to the sale and had deposed that the estate duty had been paid on the lands and that no debts were owing, and thus, the beneficiaries were entitled to distribution of the lands. The issue for consideration was whether the court should protect the rights of the respondents as beneficiaries or give preference to the interveners as purchasers of the lands on the strength of the agreement.

Held, dismissing the application:

Notwithstanding the fact that the interveners as purchasers had paid the necessary deposit, the court must protect the rights of the respondents as beneficiaries as opposed to the interests of the interveners as purchasers. The interveners as purchasers knew that the respondents as beneficiaries must consent to the sale of those lands. Moreover, the agreement was a conditional contract and unenforceable until the permission of the court was obtained.

The consent of the respondents as beneficiaries — more in the nature of third parties — was required and that being the case, the interveners, even if they wanted to, could not obtain specific performance. Further, specific performance could not be decreed to compel a third party to grant the necessary consent as that third party is not a party to

A that contract (see pp 132I and 133A–B); *Che Ah & Anor v Che Ahmad* [1941] MLJ 126, *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23, *Gan Khay Beng & Ors v Ng Liat Cheng & Ors* [1982] 1 MLJ 163, *Hj Saud v Hj Ahmad & Anor* [1957] MLJ 50, *Estate of Tunku Mohamed Jewa (deceased), Re* [1982] 2 MLJ 44, *Ng Lit Cheng v Felixia Varnakulasinghe & Anor* [1977] 2 MLJ 249, *Brown v Heffer* (1967) 116 CLR 344 and *Kennedy v Vercoe* (1906) 105 CLR 521 followed.

[Bahasa Malaysia summary

Melalui suatu perjanjian jual-beli ('perjanjian tersebut') bertarikh 7 September 1993, pemohon-pemohon yang merupakan pentadbir C harta pusaka Goh Keng Hee ('si mati') telah bersetuju menjual tiga bidang tanah pertanian ('tanah tersebut') kepada pencelah-pencelah. Perjanjian tersebut telah diikat di antara pihak-pihak atas kekukuhan suatu dokumen yang dikenali sebagai 'Pemberikuasa dan Perjanjian' ('dokumen pemberikuasa') bertarikh 14 Ogos 1993. Dokumen D pemberikuasa telah memberikan broker tanah yang bertindak untuk pemohon-pemohon kuasa tak boleh batal untuk menjual tanah tersebut bebas dari sebarang bebanan dan dengan milikan kosong tertakluk kepada terma dan syarat tertentu. Dokumen pemberikuasa juga mengandungi suatu fasal bahawa benefisiari 'haruslah bersetuju kepada pemberikuasa dan perjanjian'. Menurut dokumen pemberikuasa, E pemohon-pemohon membuat permohonan untuk satu perintah meluluskan jualan tanah tersebut kepada pencelah-pencelah.

Penentang-penentang adalah benefisiari harta pusaka si mati. Mereka telah memfailkan afidavit-afidavit dan enggan memberikan persetujuan dan telah mendeposkan bahawa duti estet telah pun F dibayar ke atas tanah tersebut dan tidak ada wang yang terhutang, dan justeru itu, benefisiari adalah berhak kepada pengagihan tanah tersebut. Isu untuk dipertimbangkan adalah sama ada mahkamah harus melindungi hak penentang-penentang sebagai benefisiari ataupun memberi keutamaan kepada pencelah-pencelah sebagai pembeli tanah tersebut atas kekukuhan perjanjian tersebut.

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Diputuskan, menolak permohonan:

Tanpa mengendahkan fakta bahawa pencelah-pencelah sebagai pembeli telah membayar deposit yang perlu, mahkamah mesti melindungi hak penentang-penentang sebagai benefisiari berbanding H dengan kepentingan pencelah-pencelah sebagai pembeli. Pencelah-pencelah sebagai pembeli tahu bahawa penentang-penentang sebagai benefisiari mesti bersetuju kepada jualan tanah tersebut. Tambahan lagi, kontrak tersebut adalah bersyarat dan tidak boleh dikuatkuasakan sehingga kebenaran mahkamah diperolehi.

I Kebenaran penentang-penentang sebagai benefisiari — lebih bersifat pihak ketiga — dikehendaki dan oleh itu, pencelah-pencelah, jika pun mereka hendak, tidak dapat memperolehi pelaksanaan spesifik. Selanjutnya, pelaksanaan spesifik tidak boleh didekrikan bagi mewajibkan suatu pihak ketiga untuk memberikan kebenaran

yang perlu kerana pihak ketiga itu bukannya satu pihak kepada kontrak itu (lihat ms 132I dan 133A–B); *Che Ah & Anor v Che Ahmad* [1941] MLJ 126, *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23, *Gan Khay Beng & Ors v Ng Liat Cheng & Ors* [1982] 1 MLJ 163, *Hj Saud v Hj Ahmad & Anor* [1957] MLJ 50, *Estate of Tunku Mohamed Jewa (deceased), Re* [1982] 2 MLJ 44, *Ng Lit Cheng v Felixia Varnakulasinghe & Anor* [1977] 2 MLJ 249, *Brown v Heffer* (1967) 116 CLR 344 dan *Kennedy v Vercoe* (1906) 105 CLR 521 diikut.]

Notes

For cases on administration of estate, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1659–1726.

Cases referred to

Brown v Heffer (1967) 116 CLR 344 (folld)
Che Ah & Anor v Che Ahmad [1941] MLJ 126 (folld)
Estate of Tunku Mohamed Jewa (deceased), Re [1982] 2 MLJ 44 (folld)
Gan Khay Beng & Ors v Ng Liat Cheng & Ors [1982] 1 MLJ 163 (folld)
Hj Saud v Hj Ahmad & Anor [1957] MLJ 50 (folld)
Itam bte Saad v Chik bte Abdullah [1974] 2 MLJ 53 (refd)
Kennedy v Vercoe (1906) 105 CLR 521 (folld)
Ng Lit Cheng v Felixia Varnakulasinghe & Anor [1977] 2 MLJ 249 (folld)
Yap Yoke Luan & Ors v Ong Wee Tok & Ors [1984] 1 MLJ 23 (folld)

Legislation referred to

Probate and Administration Act 1959 s 60(3)

Marie R Cocheril (*Rozinah Nizaruddin S Gunapati & Co*) for the applicants.
S Sagadeva (*Saga & Associates*) for the respondents.
Soo Hoo Siew Pheng (*Arthur Lee & Co*) for the interveners.

Abdul Malik Ishak J: By a sale and purchase agreement dated 7 September 1993, the applicants as administratrixes of the estate of Goh Keng Hee agreed to sell three pieces of agricultural lands ('the land') categorized as:

(a) EMR 612 Lot 947 measuring 8 acres 0 rood 20 poles;

(b) EMR 595 Lot 930 measuring 4 acres 2 roods 10 poles; and

(c) EMR 596 Lot 931 measuring 9 acres 0 rood 20 poles

and located in the vicinity of Mukim Plentong, in the State of Johor, to the interveners at the price of RM501,687.50. The sale and purchase agreement was entered into between the parties on the strength of a document known as 'Authorization and Agreement' ('the authorization document') dated 14 August 1993 executed between the applicants and a broker by the name of Tan Yeoh Wah. That authorization document gave Tan Yeoh Wah an express and irrevocable authority to sell the land free from encumbrances and with vacant possession subject to certain salient terms and conditions — foremost of which being the following term that appears at p 3 and which reads as follows:

> We further represent and warrant that all (the) beneficiaries of the estate of the deceased have agreed or shall agree to this authorization and agreement in particular to the payment to you and/or your nominee(s) as stipulated herein.

Section 14(b) of the schedule to the sale and purchase agreement states that:

> After execution by both parties hereof, the vendor ['the applicants'] shall apply for the necessary court order approving the sale and transfer herein ['the court order']. If the court order is successfully obtained, the vendor ['the applicants'] shall deliver a sealed copy of the court order to the purchaser or his solicitors. The date on which the purchaser or his solicitors shall have received a sealed copy of the court order shall be called 'the notification date'. This agreement is conditional upon the vendor successfully obtaining the court order.

This clearly imposes a duty on the applicants as vendors to obtain a court order to approve the sale and transfer of the land to the interveners. But the applicants as vendors simply failed to obtain that court order. This prompted the interveners who hd paid RM50,168.75 on 8 September 1993 by way of a deposit, to file Civil Suit No 22–31–1996 and on 20 June 1996, they obtained a High Court order in chambers, ordering the applicants as vendors to apply to the High Court, Johor Bahru for approval to sell the land to the interveners. Realizing their folly, the applicants as vendors now apply vide encl 3 to this court for an order approving the sale of the land to the interveners.

The three respondents are the beneficiaries of the estate of Goh Keng Hee and since they were not in the country at the material time, the sale and purchase agreement contained a clause that the beneficiaries 'shall agree to this authorization and agreement' as set out in the early part of this judgment. In short, the three respondents as beneficiaries must consent to the sale of the land to the interveners. All the three beneficiaries have filed affidavits and they refused to give that crucial consent and they deposed that the estate duty had been paid on the land and that no debts were owing. This meant that the beneficiaries were entitled to a distribution of the land.

There is only one issue to this rather straightforward case and it is this: must this court protect the rights of the respondents as beneficiaries or give preference to the interveners as purchasers of the land on the strength of the sale and purchase agreement dated 7 September 1993? This issue brings to the forefront the case of *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 (FC) where the beneficiaries there objected to the sale of the land. The facts of that case may be stated thus. The first and second respondents, as the administrators of the estate of a deceased person, had agreed to sell the land belonging to the estate, to the appellants. The sale was subject to obtaining leave of the court. The administrators delayed in applying for leave, but in the meantime the appellants were allowed vacant possession of the land. The appellants subsequently obtained an order from the High Court ordering the administrators to apply to the court for leave to sell and transfer the land. The administrators then filed an application to court for leave. The beneficiaries were cited as respondents and the appellants applied to be

added as interveners. The application was dismissed by the learned trial judge as the beneficiaries opposed the application on the grounds, inter alia, that the agreed purchase price was grossly below the market value. The appellants appealed to the Federal Court. Syed Agil Barakbah FJ (as he then was) delivering the judgment of the Federal Court had this to say at p 25 of the judgment:

> In this regard, we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the court before it could be carried into effect and they had taken the risk of losing their bargain if the court refused to grant such approval. The duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion, the court will have to look into the facts and surrounding circumstances of the case, ie whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The court is concerned that the price is a reasonable one, not at the time the offer was made, but at the time of hearing the application for approval of the proposed sale (see *Che Ah & Anor v Che Ahmad* [1941] 10 MLJ 126 and *Buttle v Saunders* [1950] All ER 193 at p 195 and *Tunku Ismail bin Tunku Mohd Jewa & Anor v Tunku Baharom bin Tunku Mohd Jewa & Ors* [1982] 2 MLJ 44 at p 45). We agree with respect to the learned judge that the purchase consideration of RM150,000 was manifestly low in the light of the valuation of the market value of RM244,000 for the said land at the material time. It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the common-sense rule of calling for a valuation report. That would have assisted them in considering whether the purchase consideration they had agreed upon was reasonable as the best possible price. No doubt there was no higher offer at the material time but in our opinion, they have not exercised due prudence in the interests of the estate by executing the contract for such a low consideration without consulting and obtaining the consent of the beneficiaries. Apart from that, they went further in allowing the appellants to take possession of the said land, reap the benefit from the sales of rubber and clear the land for the purpose of a housing project. The fact that the appellants have paid 30% deposit and incurred expenses while in occupation of the said land may be a matter for consideration by the court but that cannot and does not override the duty of the court to see that the estate benefits as much as possible.

No doubt in the present case, there was no affidavit evidence about the market value of the land and the respondents as beneficiaries did not advert to the question of whether the sale price at RM501,687.50 was reasonable or otherwise, yet an attempt was made to refer to a valuation report prepared by Jones Lang Wootton dated 26 December 1996 showing rather high price tags for the land in the open market. That valuation report was nowhere exhibited in the affidavits filed by both parties and I do not propose to place any reliance on it. Notwithstanding the fact that the interveners as purchasers have paid the necessary deposit, this court must protect the rights of the respondents as beneficiaries as opposed to the

interests of the interveners as purchasers. The interveners as purchasers knew that the respondents as beneficiaries must consent to the sale of those lands. It was a conditional contract. The consent of the respondents as beneficiaries — more in the nature of third parties — was required and that being the case, the interveners, even if they wanted to, could not obtain specific performance. It is my judgment that specific performance cannot be decreed to compel a third party to grant the necessary consent as that third party is not a party to that contract. *Kennedy v Vercoe* (1906) 105 CLR 521 and *Brown v Heffer* (1967) 116 CLR 344 established the principle that no decree may be granted against either party to the contract if it was not within the powers of that party to fulfill the obligation but rather that power lies on the third party to give the necessary consent.

Yap Yoke Luan's case considered *Che Ah & Anor v Che Ahmad* [1941] MLJ 126. The facts in *Che Ah & Anor v Che Ahmad* may be stated thus. There the administrator of an estate applied to the court for leave to sell certain land, which he had verbally agreed to sell at the price of RM12,777.50, subject to the approval of the court. Two of the beneficiaries of the estate brought to the notice of the court that their solicitor had received an offer of RM14,000 for the land. The Court of Appeal had to consider the crucial question of whether preference should be given to the purchaser or to the beneficiary. In a short judgment, the question was answered in favour of the beneficiary. The Court of Appeal was of the view, rightly so, that it was not for the court to consider the interests of the purchaser, who was well aware of the risks which he took when he entered into a conditional contract. The duty of the court was said to protect the rights of those interested in the property and that it was immaterial that at the time the offer was made the price was a reasonable one. This was what Terrell JA said at p 127:

> In all these cases, the duty of the court is to protect the rights of the parties who have an interest in the property to be sold, and it is a matter for the discretion of the judge whether the sale should be by public auction or whether the court is satisfied that, in a private sale, the highest price can be obtained. Where in an application under the Federated Malay States procedure all the beneficiaries are sui juris and have consented, the court will be entitled to assume that the price offered is the best obtainable.

Terrell JA highlighted in strong terms the risks which potential purchasers would face when entering into contracts which have not been approved by the court. This was what his Lordship said at p 127:

> A purchaser under these conditions is perfectly well aware that his contract has to be approved by the court before it can be carried into effect, and he takes the risk of losing his bargain if a better offer is obtained before the approval of the court is given, or of being held to his bargain if, for any reason, there has been a fall in the value of the land between the date of his offer and the date of the order confirming the contract.

The administratrixes must, as stated by Lord Russell of Killowen in *Gan Khay Beng & Ors v Ng Liat Cheng & Ors* [1982] 1 MLJ 163 at p 164, always obtain the permission of the court before they can deal with the land. Thus, the administratrixes are unlike executors who may in certain

circumstances deal with the properties without the permission of the court: s 60 (3) of the Probate and Administration Act 1959. It is apparent from the facts that the administratrixes entered into an agreement for the sale of the land to be followed by the necessary court order approving that sale and transfer. That being the case, the sale and purchase agreement must surely have remained unenforceable until the permission of the court was obtained: *Hj Saud v Hj Ahmad & Anor* [1957] MLJ 50. The courts have all along being cautious and have regarded contracts entered into by administrators/administratrixes before obtaining the approvals of the courts as nothing more than conditional contracts: *Che Ah & Anor v Che Ahmad* [1941] MLJ 126; *Re Estate of Tunku Mohamed Jewa (deceased)* [1982] 2 MLJ 44 and *Yap Yoke Luan*'s case. I can do no better than to cite passages from the judgment of Gill CJ (Malaya) (as he then was) in *Ng Lit Cheng v Felixia Varnakulasinghe & Anor* [1977] 2 MLJ 249 (FC) especially at p 253, to reinforce my stand:

> There must be a clear distinction between the position of a potential purchaser from the estate of an intestate deceased whose contract can only be conditional until the court approves the sale and the position of a purchaser whose contract has already been confirmed by a court order.

Earlier at p 253, his Lordship Gill CJ (Malaya) (as he then was) said:

> ... upon the approval by the court of the sale agreement the appellant's rights in the land crystallized and that the administrator thereafter held the land in trust for him.

Re Estate of Tunku Mohamed Jewa (deceased) vigorously applied the decision of the Court of Appeal in the case of *Che Ah & Anor v Che Ahmad* [1941] MLJ 126. Syed Agil Barakbah J (as he then was) decided *Re Estate of Tunku Mohamed Jewa (deceased)* where the facts can briefly be stated thus. The plaintiffs as administrators entered into a conditional contract for the sale of a piece of land belonging to the deceased. The agreed purchase price exceeded the valuation price. The plaintiffs, in due course, applied to the court for permission to sell the land to the purchaser. One of the beneficiaries who had the largest interest in the estate of the deceased objected to the sale on the ground that she was interested in purchasing the property herself at a higher price than that offered by the purchaser. It was also established that there were other offers to purchase the land at even much higher prices. Syed Agil Barakbah J refused to grant the permission to allow the administrators to sell the land to the first purchaser and his Lordship aptly said at p 46 of the judgment:

> ... it is clear that the plaintiffs are not bound by the agreement executed with the purchasers unless leave is granted by this court. In the light of the authorities and principles discussed above and in view of the higher offers made, I have no alternative but to refuse granting leave in approving the conditional contract, even if the offer of RM830,000 at the material time was a reasonable one. In fact, it cannot be said to be reasonable in view of the objector's higher offer. As between the two, the latter should stand in a better position since apart from being the beneficiary holding the highest share in the estate, she has offered a higher price well before the conditional contract.

A Syed Agil Barakbah J then ordered the land to be sold by way of tender to the highest bidder before seeking the court's approval for the sale of the property.

All these authorities show a singular trend and that trend is this. That it may be necessary for an administrator or an administratrix to seek the B consent of all the beneficiaries before entering into a contract for the sale of the deceased's property. My research however does not produce any statutory provision for such a requirement. Thus, it is not surprising for Syed Agil Barakbah J (as he then was) to say in *Itam bte Saad v Chik bte Abdullah* [1974] 2 MLJ 53 especially at p 55:

C > The section (referring to s 45 of the Kedah Administration of Estates Enactment No 1 which is now s 60 of the Probate and Administration Act 1959) does not require such consent (of the beneficiary) ... All it says is that permission of the court has to be obtained if a transfer of the said land is to be made. It is, in my view, for the court to consider whether such consent was necessary.

D It is interesting to note that the Privy Council in *Gan Khay Beng & Ors v Ng Liat Cheng & Ors* approved that part of the decision of Gill CJ (Malaya) (as he then was) in the case of *Ng Lit Cheng v Felixia Varnakulasinghe & Anor* where his Lordship at p 252 said:

E > I do not think there is any stringent rule of law or procedure that all beneficiaries must be served, especially if they are descendants of the beneficiaries named in the will and their whereabouts are unknown, when an application is made to court for leave to convert land into money for purposes of distribution.

All said and done, it is a correct statement of the law to say and I so say F that where an administrator or an administratrix has entered into a contract for the sale of property and such sale is subsequently approved by the court, the purchaser has a better bargaining power for he may obtain specific performance to enforce that contract in the event the administrator or administratrix, whichever is the case, refused to proceed with the sale. The crucial question to ask would be this: Must this court approve the sale G of the land to the interveners as set out in encl 3? The answer is in the negative. All the three respondents who are beneficiaries have refused to give their consents and, on the authorities as discussed above, this court must protect their rights as against that of the interveners who are mere purchasers. Enclosure 3 must therefore be dismissed with costs.

H *Application dismissed.*

Reported by Kenneth Goh

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